



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/34284/2013

THE IMMIGRATION ACTS

Heard at Field House

**On 3 October 2014
Prepared 3 October 2014**

**Determination
Promulgated
On 20 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MOHAMMED NAFIH NAMBEETTIKKULAM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Alexander, Counsel, instructed by Krish Morgan
Solicitors

For the Respondent: Miss A Everett, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a national of India, date of birth 13 October 1987, appealed against the Respondent's decision to refuse leave to remain on 6 August 2013.
2. An appeal against that decision came before First-tier Tribunal Judge O'Garro who, on 5 August 2014, dismissed the appeal both under the Immigration Rules and in respect of Article 8 outside of the Rules.
3. Permission to appeal that decision was given by First-tier Tribunal Judge Grimmett on 21 August 2014.
4. The basis of the Appellant's application had essentially been outside of the Rules as they stood when he applied in June 2012 so as to enable him to await his results of his MBA degree course at the London School of Management and Science. Illness had prevented him completing the required processes in time. It is plain from the application letter that this was the basis for it.
5. The Respondent in the Reasons for Refusal Letter solely considered the Appellant's claim by reference to paragraph 275ADE of the Immigration Rules which had come into effect on 8 July 2012. As a fact it is undisputed that at 8 July 2012 the Appellant's application had been made but it had not been determined. The Respondent's Reasons for Refusal Letter shows how paragraph 276ADE came to be considered and the basis on which the application was rejected.
6. The Secretary of State never considered the application as originally made based on Article 8 of the ECHR. Rather the Secretary of State solely addressed the matter by reference to whether or not there were exceptional circumstances to look at the matter outside of the current Immigration Rules.

7. In submissions Mr Alexander relied upon the case of Edgehill [2014] EWCA Civ 402 and to the construction put on the Rules, particularly with reference to the Rules coming into effect on and after 9 July 2012, but in the context of looking at an issue of length of stay of long residence and the change that had come about through the change in the Rules relating to the fourteen year and twenty year requirements.
8. In the present case there is a materially factual difference set of circumstances in that, as Miss Everett submitted, the Appellant's claim has always or only ever been based on an application outside of the Rules arising from the particular and peculiar circumstances which prevented the Appellant completing his studies through ill health.
9. Nevertheless Edgehill, as the decision sets out, notes the requirements of the statement of changes and the transitional arrangements in the following terms.

“However, if an application for entry clearance, leave or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012.”

It is asserted by Mr Alexander that this principle applied as much as to his client's applications and no doubt many others. Before me it was not submitted but Edgehill was subject to an appeal or that any other appeal had been heard against the point raised within it.

10. The case of Rafiq [2014] EWHC 1654 (Admin) before Philip Mott QC sitting as a Deputy High Court Judge dated 7 May 2014 bearing in mind that must have been a judicial review application, draws a distinction between the situation before and after the July 2012 changes. This may be a valid distinction and it may apply to this appeal but I am bound by the Court of Appeal's decision in Edgehill which does not acknowledge such a

difference given the way it expressed its view on the requirements of the Rules coming into force on 9 July 2012. The Court of Appeal concluded the transitional provisions stated that the new Rules would not apply to applications for leave to remain before that date which in this case is what happened.

11. I find that Edgehill is binding upon me. and therefore the Respondent did not consider Article 8 ECHR before the changes in the Rules. The Respondent did not consider or apply Paragraph 277C of the Rules or thereby seek to justify the decision under paragraph 276ADE of the Rules.
12. Accordingly I find the original Tribunal made a material error of law. The original Tribunal's decision cannot stand.
13. In the light of the submissions made I am satisfied that this matter should be considered in the Upper Tribunal on the basis of the law prior to 9 July 2012.14. Given the foregoing I find as follows:- The appeal is allowed to the extent it is remitted to be remade by the Secretary of State in accordance with the law prior to the 9 July 2012 changes to the Immigration rules.

Signed

Date 10 October 2014

Deputy Upper Tribunal Judge Davey